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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH ALBERT FLORES, Defendant and Appellant.	E068512 (Super.Ct.No. RIF1500621) OPINION

APPEAL from the Superior Court of Riverside County. Stephen J. Gallon, Judge. Affirmed with directions.

Kevin Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Steve Oetting and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant, Joseph Albert Flores, of one count of second degree robbery of a department store loss prevention employee. (Pen. Code, § 211.)[1] In a bifurcated proceeding, defendant admitted he committed the robbery while released on bail (§ 12022.1) and had four prison priors (§ 667.5, subd. (b)). The court struck a fifth prison prior allegation and sentenced defendant to seven years in prison, comprised of the low term of two years for the robbery, two years for the out-on-bail enhancement, and three years (one year each) for the first three prison priors. The court did not impose sentence on the fourth prison prior.

In this appeal, defendant claims (1) insufficient evidence supports the force or fear element of his robbery conviction, (2) the court erroneously failed to grant his pretrial *Trombetta/Youngblood*[2] motion to dismiss the robbery charge due to the police and prosecution's failure to preserve two video recordings of defendant's confrontation outside the store with the loss prevention employee, which may have shown defendant did not use force or fear in taking items he had shoplifted from the store, and (3) the true finding on the fourth prison prior must be stricken because the underlying felony conviction has been reduced to a misdemeanor. We strike the true finding on the fourth prison prior and affirm the judgment in all other respects.

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[1] Undesignated statutory references are to the Penal Code unless otherwise indicated.

[2] *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*) and *Arizona v. Youngblood* (1988) 488 U.S. 51 (*Youngblood*).

II. FACTUAL BACKGROUND

A. *Prosecution Evidence*

On December 8, 2014, at 1:30 p.m., M.B. was working at a department store in Moreno Valley as a loss prevention supervisor. While watching the store's video surveillance monitors from the loss prevention office, M.B. observed defendant and Jessica Baron in the fragrance/cosmetics section of the store. Defendant was wearing baggy pants and a buttoned-up shirt; Baron was carrying a large purse and appeared to be pregnant.

On the video monitors, M.B. saw defendant and Baron each select a fragrance or cologne, then conceal the items on their persons—defendant in his pants pocket and Baron in her purse. Next, defendant and Baron each selected a watch, then went to the intimates department. When defendant and Baron were in the intimates department, M.B. saw that the watches were no longer in their hands. M.B. directed a sales associate to look for the watches in the aisle in which defendant and Baron had selected them, but the sales associate was unable to find the watches.

In the intimates department, Baron selected women's undergarments, then she and defendant went to the shoe department and selected a pair of shoes. M.B. then saw Baron conceal the shoes inside her purse and saw defendant conceal the female undergarments in his waist area. Next, defendant and Baron walked to the front of the store and past the cash registers without paying for any items. Then they walked out of the store at a fast pace.

Meanwhile, M.B. called the Riverside County Sheriff's Department dispatch line and asked that an officer be sent to assist him because he suspected defendant and Baron were shoplifting and Baron appeared to be pregnant. M.B. sprinted to get ahead of defendant and Baron in the parking lot in front of the store. He positioned himself directly in front of defendant, identified himself as being from the store's "loss prevention," and asked defendant and Baron to come back inside the store because they had been shoplifting. M.B. focused on defendant, because Baron was pregnant and he was concerned she might trip or fall. As he focused on defendant, M.B. lost sight of Baron.

Defendant was uncooperative with M.B. and began unbuttoning his shirt. After M.B. repeatedly tried to convince defendant to come back inside the store, defendant said he had "had enough of this" and, with his shirt unbuttoned, opened his shirt by his waistband and reached into his waistband. At that point, M.B. lost sight of defendant's hands and, fearing defendant might have a weapon, grabbed defendant in a "bear hug" and took him to the ground.[3] M.B. landed on top of defendant, with defendant facing downward, and defendant kept trying to free himself. Throughout the confrontation and struggle, defendant never indicated he would cooperate or return any of the items he had taken. During the struggle, a bottle of cologne fell out of defendant's pants pocket and broke on the pavement.

[3] Defendant did not charge at, throw a punch at, or try to strike M.B., and did not verbally threaten M.B.

M.B. was on the telephone with the dispatcher when he confronted defendant and Baron outside the store, and the audiotaped call was played for the jury. On the initial portion of the audiotape, M.B. was heard identifying himself as "loss prevention" and saying, "I'm on the phone with the police, I need you to please come back inside . . . . I'm on the phone with the police, they're on their way." Much of the audiotape is unintelligible, but in response to M.B.'s initial demands to come back inside the store, defendant was heard saying, "I'm not, hey, don't (unintelligible) . . . . [¶] . . . [¶] . . . come back inside."

Next on the audiotape, the following colloquy was heard:

"[DEFENDANT]: . . . hey, don't (unintelligible) arms (unintelligible).

"[M.B.]: (Unintelligible) stopped 'cause you—you get your hands out [of] your pockets.

"[DEFENDANT]: Nobody shoves me.

"[M.B.]: You need to come back inside.

"[BARON]: What the fuck?

"[DEFENDANT]: (Unintelligible).

"[M.B.]: Get your hand out of your pocket. You need to come back inside right now. Come back inside. Don't make this any worse tha[n] it needs to be.

"[DEFENDANT]: Nobody's making anything worse.

"[M.B.]: You need to (unintelligible).

"[BARON]: (Unintelligible).

"[DEFENDANT]: Hey, my brother's right there.

"[M.B.]: . . . I don't care. [¶] . . . [¶]

"[DEFENDANT]: Hey, Bo-Bo.

"[M.B.]: (Unintelligible). And (unintelligible) stop.

"[BARON]: Get the fuck off me.

"[M.B.]: You need to come back inside.

"[BARON]: Don't (unintelligible).

"[DEFENDANT]: (Unintelligible).

"[M.B.]: Hey, just.

"[BARON]: (Unintelligible).

"[M.B.]: You need to just come back inside."

M.B. testified that as he struggled on the ground with defendant, Baron got into a car and began driving it toward M.B. and defendant. M.B. got up and moved himself and defendant out of the way of the car, and as he did so the front of the car "slightly" struck his leg, but he was able to roll onto the top of the hood and onto the ground. Next, Baron got out of the car and began hitting M.B. on his head. Defendant partially entered the car before a male bystander grabbed him and kept him from getting into the car. Other bystanders got between Baron and M.B. to prevent Baron from further striking M.B. M.B. got ahold of defendant and tried to direct him back into the store, but defendant continued to struggle to get away.

One bystander saw that defendant was "just . . . swinging" while M.B. was just "[t]rying to hold onto him" and Baron was "go[ing to] run over" M.B. with the car. The bystander heard M.B. identify himself to defendant before the altercation, and saw that M.B. may have touched defendant's arm while asking him to come back inside the store, and "then everything just went beserk." When asked whether M.B. was being "overly aggressive" with defendant, the bystander said, "[n]o, not at all," and defendant was walking away from M.B. when M.B. touched his arm. Another bystander testified that M.B. "showed real restraint" and was "trying his best not to fight back" as defendant and Baron were "lashing out at him."

The struggle between M.B. and defendant moved from the parking lot to a planter area with trees and bushes near the front of the store. In the planter area, more merchandise fell out of defendant's pants pocket. Defendant kept trying to get away and M.B. took him down to the ground by the bushes. Baron yelled for M.B. to get off of defendant and let him go. Defendant said M.B. was hurting him and used his elbows to strike M.B. M.B. kept telling defendant to calm down and that he would let defendant off of the ground if he stopped struggling. Defendant continued to struggle, and M.B. kept him on the ground until police officers arrived.

No weapons were found on defendant. Several items taken from the store, including female underwear, cologne, and a watch, were recovered from defendant, and other items, including a pair of shoes, were recovered from Baron's purse or the car.

B. *Defense Evidence*

In testifying in his own defense, defendant admitted he shoplifted several items from the store, including two or three bottles of cologne, a brassiere and female underwear, a pair of shoes, and two watches. He concealed the colognes and watches in his pocket and the underwear in his waistband. Then he left the store without paying for the items.

As he was crossing the street outside the store, M.B. quickly walked past him and blocked his path. M.B. told him to stop and come back inside the store, but he was scared and tried to walk around M.B. M.B. then "grabbed" defendant and Baron by their arms and tried to pull them back into the store. They told M.B. to let them go, and Baron pulled her arm free. Defendant then reached into his waistband to drop or "abandon" the items he had taken. M.B. then grabbed both of defendant's arms and "slammed" him to the ground. M.B. was on top of defendant as they struggled on the ground and Baron drove up in a car.

Defendant opened the car door and tried to jump in, but a man came up from behind, grabbed defendant, and picked him up off of the ground. M.B. then grabbed defendant and slammed him to the ground again. The struggle between defendant and M.B. moved to the planter area near the front of the store where M.B. pinned defendant against a tree. Numerous times, defendant told M.B. to let him go and that he could not breathe. M.B. finally let defendant go when police officers arrived. An officer handcuffed defendant and took him to a patrol car.

Defendant acknowledged he had previously been in trouble with the law and knew there would be consequences for his shoplifting when M.B. confronted him. Still, he did not go back inside the store as M.B. was asking him to do, but claimed he tried to abandon the items he had taken. He admitted he had a 2002 felony conviction for recklessly evading a police officer and 2002 and 2007 felony convictions for being a felon in possession of a firearm.

III. DISCUSSION

A. *Substantial Evidence Supports the Force or Fear Element of Defendant's Robbery Conviction*

Defendant claims his robbery conviction must be reversed because insufficient evidence shows he used force or fear to retain possession of the shoplifted items after M.B. confronted him outside the store. We disagree.

1. Standard of Review and Applicable Law

In considering a claim on appeal that insufficient evidence supports a criminal conviction, we review the entire record in the light most favorable to the prosecution to determine whether it contains substantial evidence—evidence that is reasonable, credible, and of solid value—from which a rational trier of fact could have found the defendant guilty of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578.) We presume in support of the judgment every fact the trier of fact could have reasonably deduced from the evidence. (*People v. Jackson* (2014) 58 Cal.4th 724, 749.) Reversal is unwarranted unless "'upon no hypothesis whatever is there sufficient

substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211; *People v. Jackson* (2016) 1 Cal.5th 269, 343.) A robbery continues until the perpetrator has reached a place of temporary safety with the property. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165). Thus, "[a] defendant who does not use force or fear in the initial taking of the property may nonetheless be guilty of robbery if he [or she] uses force or fear to retain it or carry it away in the victim's presence. [Citations.]" (*People v. McKinnon* (2011) 52 Cal.4th 610, 686.)

This type of robbery is known as an "*Estes* robbery." (*People v. Williams* (2013) 57 Cal.4th 776, 797-798 (dis. opn. of Baxter, J.); *People v. Estes* (1983) 147 Cal.App.3d 23, 27-28; see also *People v. Anderson* (2011) 51 Cal.4th 989, 994-995; *People v. Gomez* (2008) 43 Cal.4th 249, 258-261.) An *Estes* robbery occurs when, for example, the defendant uses force or fear in resisting the victim's attempt to regain possession of the property, even if the defendant did not use force or fear in initially taking the property. (See *People v. McKinnon*, *supra*, 52 Cal.4th at pp. 686-687.)

The force or fear element of robbery is a singular element when no force is actually used but force is threatened and reasonably instills fear in the robbery victim. "Generally, 'the force by means of which robbery may be committed is either actual or constructive. The former includes all violence inflicted directly on the persons robbed;

the latter encompasses all . . . means by which the person robbed is put in fear sufficient to suspend the free exercise of . . . will or prevent resistance to the taking.' [Citation.] This 'constructive force' means 'force, not actual or direct, exerted upon the person robbed, by operating upon [a] fear of injury. . . .'" (*People v. Wright* (1996) 52 Cal.App.4th 203, 210.) Force includes, "'such *threat* or *display* of physical aggression toward a person as *reasonably inspires fear* of pain, bodily harm, or death.'" (*Id*. at pp. 210-211.) Thus, force is not an element of robbery independent of fear. (*Id*. at p. 211.) """[T]he coercive effect of fear induced by threats is in itself a form of force, so that either factor may normally be considered as attended by the other."""" (*Ibid*.)

The jury was instructed on the elements of robbery and that "[a] store or business employee or loss prevention officer who is on duty has possession of the store or business owner's property. [¶] . . . [¶] Robbery prosecution of a defendant who did not use force or fear in taking the property requires proof beyond a reasonable doubt that the defendant used force or fear to maintain possession of the property against lawful efforts of the owner to regain it." (CALCRIM No. 1600 [Robbery].) The jury was also instructed on petty theft as a lesser included offense of robbery. (CALCRIM No. 1800 [Theft by Larceny].)

2. Analysis

Substantial evidence shows defendant used force or fear to retain possession of the items he had shoplifted from the store and thus committed a robbery. M.B. testified that when he confronted defendant and Baron outside the store and demanded that the two of

them come back inside the store, defendant unbuttoned his shirt, said he had "had enough of this," then opened his shirt by his waistband and reached into his waistband. M.B. testified that defendant's actions and statements made him fear defendant might have a weapon and would use it unless M.B. allowed defendant and Baron to leave with the items they had stolen.

Under the circumstances of the confrontation, the jury could have reasonably inferred that defendant's actions and statements both subjectively and reasonably caused M.B. to fear that defendant had a weapon in his waistband and would use it to physically injure M.B. unless M.B. allowed defendant and Baron to leave with the items they had taken from the store. (See *People v. Morehead* (2011) 191 Cal.App.4th 765, 778.) M.B. acted consistently with this fear when he "bear hug[ged]" defendant and wrestled defendant to the ground after defendant opened his shirt by his waistband and M.B. could no longer see defendant's hands.

In closing argument, the prosecution advanced the theory that defendant directly perpetrated the robbery by reaching into his waistband and taking a fighting stance toward M.B., along with two alternative theories for finding defendant guilty of robbery: (1) that he aided and abetted Baron in committing the robbery outside the store, and (2) the robbery outside the store was a natural and probable consequence of defendant's and Baron's theft of the items inside the store. The jury was instructed on both aiding and abetting and the natural and probable consequences doctrine. Defendant also claims insufficient evidence supports either of these two alternative theories of the robbery.

Assuming defendant is correct and insufficient evidence shows he either aided and abetted Baron in committing the robbery or that, under all of the circumstances, the robbery outside the store was a natural and probable consequence of the shoplifting inside the store, reversal of defendant's robbery conviction is unwarranted. When a jury is instructed on alternative but valid legal theories, and one of those legal theories lacks evidentiary support, reversal is unwarranted unless the record "affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*People Guiton* (1993) 4 Cal.4th 1116, 1130; see *id.* at pp. 1129-1131.)

Here, nothing in the record affirmatively shows the jury found defendant guilty of the robbery based on the theory he aided and abetted Baron in committing the robbery or the theory that, under all of the circumstances, the robbery outside the store was a natural and probable consequence of the shoplifting inside the store. To the contrary, the prosecutor emphasized that defendant directly perpetrated the robbery. The prosecutor argued: "I think everyone can agree on one thing in this case, the one thing that the defendant said that you can believe, everyone can agree on, he should have gone back in that store. But in that moment, he didn't. He made a choice. . . . That choice that he made put [M.B.] in fear for his safety. . . . [A]s much as the defendant wants you to believe that he was reaching for his waistband to pull out that property to just politely turn it over to [M.B.], that's not what his actions indicated. That is not what caused

[M.B.] to take the actions that he took. The reason [M.B.] acted the way he did is because it was the defendant that put him in fear for his safety."

Additionally, the unanimity instruction prevented the jury from splitting its verdict among the three alternative legal theories presented for the robbery. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 152 [appellate courts presume that juries follow the trial court's instructions].) Lastly, "[t]he jury was as well equipped as any court to analyze the evidence and to reach a rational conclusion. The jurors' 'own intelligence and expertise will save them from' the error of giving them 'the option of relying upon a factually inadequate theory.' [Citation.]" (*People v. Guiton, supra,* 4 Cal.4th at p. 1131.)

B. *Defendant's* Trombetta/Youngblood *Claim Has Been Forfeited and Lacks Merit Because Defendant Did Not Show that Law Enforcement Acted in Bad Faith in Failing to Preserve Video Recordings of the Confrontation Outside the Store*

Defendant claims his robbery conviction must be reversed and the robbery charge dismissed with prejudice because the investigating sheriff's deputies willfully failed to preserve potentially exculpatory evidence, namely, the officers' video recordings of (1) the store's surveillance video recording of the confrontation outside the store, and (2) a bystander's cell phone recording of the part of the confrontation in which Baron drove her car toward M.B. Defendant argues these two video recordings may have shown he did not use force or fear in retaining possession of the shoplifted items after M.B. confronted him and Baron outside the store.

The People argue defendant has forfeited his claim that his *Trombetta/Youngblood* motion was erroneously granted because he failed to obtain the court's ruling on the motion. We agree. We also conclude the motion lacked merit because defendant did not show or adduce any evidence that the prosecution or any law enforcement officers acted in bad faith in failing to preserve these video recordings.

1. Relevant Background

In response to a pretrial defense subpoena seeking the store's surveillance video of the entire incident, including the confrontation outside the store, the store responded it no longer had its surveillance video because it had been destroyed or purged. The defense filed a pretrial *Trombetta/Youngblood* motion to dismiss the robbery charge based on the police and prosecution's failure to preserve two video recordings of the confrontation outside the store, namely, (1) a copy of the store's surveillance video which an investigating officer, Investigator Rose, recorded on his cell phone, and (2) Deputy Brian Sinclair's department-issued camera recording of C.M.'s cell phone recording of the part of the confrontation in which Baron drove her car toward M.B.

At a pretrial evidentiary hearing, M.B. testified he was watching defendant and Baron on the store's video surveillance system from his security office as the two of them walked through the store concealing items, then walked out of the store without paying for the items. The store's video surveillance system recorded defendant's and Baron's activities both inside and outside the store, including their confrontation with M.B. outside the store.

According to M.B., the system was malfunctioning on the day of the incident and had been for some time. The system would not allow M.B. to download the recording of the incident to a disk and preserve it on a DVD. But the system's "playback" function was working, and shortly after defendant and Baron were arrested two sheriff's deputies accompanied M.B. to the security office where M.B. replayed the store's entire video recording for the deputies, including the part showing M.B.'s confrontation with defendant and Baron outside the store. According to M.B., one of these two deputies, later identified as Investigator Rose, made a recording of the store's video on his cell phone.

Another sheriff's deputy, Deputy Brian Sinclair, testified at the pretrial hearing he was the first officer to arrive at the scene and was relieved of his investigative duties by Investigator Rose. Deputy Sinclair did not recall watching the store's video recording with Investigator Rose; he would have been relieved of his duties before that would have occurred. Deputy Sinclair testified that Deputy Kamron Honore would have been the deputy who watched the store video with Investigator Rose. Deputy Honore did not testify at the pretrial hearing or trial.

The court deferred ruling on the *Trombetta/Youngblood* motion until the parties could contact Investigator Rose and ask him whether he ever made and, if so, still had his cell phone recording of the store's video recording. The matter proceeded to trial without a ruling on the motion. During trial, Deputy Sinclair testified he interviewed several witnesses to the confrontation outside the store, including C.M., who had taken a cell

phone video recording of the part of the confrontation in which Baron drove her car toward M.B. Deputy Sinclair watched C.M's video recording and, using Deputy Sinclair's department-issued camera, took a video recording of C.M.'s cell phone video recording. Deputy Sinclair documented in his report that he had booked his video recording of C.M.'s recording into evidence, but Deputy Sinclair testified he had since been unable to find that recording. Four DVD's were booked into evidence, but none of them contained a copy of C.M.'s video recording.

Deputy Sinclair also testified he had worked with Investigator Rose, not on this case but on subsequent cases before Investigator Rose retired. According to Deputy Sinclair, Investigator Rose was "not savvy with technology" and was barely able to operate his smart phone. Deputy Sinclair also testified that sheriff's deputies "typically don't utilize" their cell phones for "these types of evidentiary things." C.M. testified he kept his cell phone recording on his cell phone for two years but no longer had the recording at the time of trial.

After C.M. and Deputy Sinclair testified before the jury, the parties stipulated that if called to testify Investigator Rose would say he did not remember "collecting a video with a recording device" and had he done so he would have booked it into evidence. The parties also stipulated that "no video" was booked into evidence.

2. Analysis

As noted, the People argue defendant has waived or forfeited his claim that his *Trombetta/Youngblood* motion to dismiss the robbery charge should have been granted,

because defendant failed to obtain the court's ruling on the motion after the court deferred ruling on the motion so the parties could contact Investigator Rose. We agree. The failure to renew a motion or objection forfeits a claim on appeal that the motion or objection had merit or was erroneously denied. (*People v. Holloway* (2004) 33 Cal.4th 96, 133; *People v. Rodgers* (1976) 54 Cal.App.3d 508, 515-517.)

The record does not show defense counsel asked the court to rule on the *Trombetta/Youngblood* motion after the court deferred ruling on it to allow the parties to contact Investigator Rose and determine whether he (1) made a cell phone recording of the store surveillance video, and (2) if so, still had that recording. Thus, defendant has forfeited his claim that the motion was erroneously denied or had merit. Additionally, the motion lacked merit because the defense did not show that any law enforcement officers or the prosecution acted in bad faith in failing to preserve the video evidence. Thus, defendant was not prejudiced by his counsel's failure to obtain the court's ruling on the *Trombetta/Youngblood* motion.

Law enforcement agencies have a duty under the due process clause of the Fourteenth Amendment to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*Trombetta*, *supra*, 467 U.S. at p. 488; *People v. Beeler* (1995) 9 Cal.4th 953, 976.) "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Youngblood*, *supra*, 488 U.S. at p. 58.) The negligent

destruction or failure to preserve potentially exculpatory evidence, without evidence of bad faith, will not give rise to a due process violation. (*Ibid.)*

In his motion, defendant claimed the store's video recording of his confrontation outside the store with M.B., which Investigator Rose recorded using his cell phone, would have shown that defendant "made no aggressive movement" toward M.B. and thus did not use force or fear in taking any of the shoplifted items. We review for substantial evidence a court's finding of the existence or nonexistence of bad faith in this context. (*People v. Alvarez* (2014) 229 Cal.App.4th 761, 776.)

As discussed, the court did not rule on the *Trombetta/Youngblood* motion and did not find that either the prosecution or any law enforcement officers acted in bad faith in failing to preserve *either* of the two video recordings of the confrontation outside the store. But even if the court had made such a finding, substantial evidence would not support it because defendant did not show, either during the pretrial evidentiary hearing or during trial, that anyone acted in bad faith in failing to preserve any video evidence.

"'The presence or absence of bad faith by the police . . . must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.'" (*People v. Frye* (1998) 18 Cal.4th 894, 953, quoting *Youngblood, supra*, 488 U.S. at p. 56, fn. *.) No evidence showed that any law enforcement officers knew that any of the video evidence was potentially exculpatory or useful to the defense. To the contrary, Deputy Sinclair testified he viewed C.M.'s cell phone recording and it showed Baron lurching her car toward M.B. Also, no evidence showed any officer knew

the store's video recording of the confrontation outside the store showed that defendant did not take an aggressive stance toward M.B. and did not use force or fear in taking the shoplifted items. (Cf. *People v. Alvarez, supra*, 229 Cal.App.4th at p. 776 [substantial evidence supported trial court's finding that police and prosecution were well aware of the potential exculpatory value of an erased video which may have shown that two defendants charged in a robbery case were not involved in the robbery].)

C. *The Judgment Is Modified to Strike the True Finding on the Fourth Prison Prior*

Defendant admitted four prison priors (Pen. Code, § 667.5, subd. (b)), but the court did not impose sentence on his fourth prison prior, the one based on his March 25, 2010, conviction for violating Health and Safety Code section 11377, subdivision (a). Instead, the court imposed one-year terms only on the first, second, and third prison priors.

Before sentencing, the court reclassified defendant's March 25, 2010, conviction for violating Health and Safety Code section 11377, subdivision (a) from a felony to a misdemeanor pursuant to Proposition 47 and Penal Code section 1170.18, subdivision (a). On this basis, defendant argues the judgment must be modified to strike the true finding on the fourth prison prior allegation, even though no punishment was imposed based on that true finding. We agree.

When, as here, a prison prior enhancement is based on a prior felony conviction which has been reclassified as a misdemeanor conviction, a necessary element of the prison prior enhancement—the underlying felony conviction—has been negated and "it

can only be said that the defendant was previously convicted of a misdemeanor." (*People v. Buycks* (2018) 5 Cal.5th 857, 889; see *id.* at pp. 888-890.) Additionally, a prison prior enhancement must be stricken under the *Estrada*[4] rule when, as here, the judgment including the enhancement is not final. (*People v. Buycks*, *supra*, at pp. 881-888, 896.)

The People argue that striking the court's true finding on the fourth prison prior allegation is moot because no punishment was imposed on that finding. We disagree. The People conflate the court's finding that defendant had a fourth prison prior with the court's decision not to impose punishment based on the court's finding that defendant had a fourth prison prior. We are able to grant defendant effective relief because striking the true finding on the fourth prison prior allegation will prevent punishment from being imposed on that true finding if defendant is resentenced. Thus, we amend the judgment to strike the true finding on the fourth prison prior allegation.

IV. DISPOSITION

The judgment is amended to strike the court's true finding on defendant's fourth prison prior allegation (Pen. Code, § 667.5, subd. (b)), the one based on defendant's March 25, 2010, conviction for violating Health and Safety Code section 11377, subdivision (a), because defendant's conviction for that offense has been reclassified from a felony to a misdemeanor pursuant to Proposition 47, and even though no punishment was imposed based on the fourth prison prior true finding. The matter is

[4] *In re Estrada* (1965) 63 Cal.2d 740.

remanded to the trial court with directions to prepare a supplemental sentencing minute order stating that the court's true finding on the fourth prison prior allegation has been stricken. The court is further directed to prepare an amended abstract of judgment reflecting this modification and to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. Although the current abstract of judgment correctly shows that no punishment was imposed, and punishment was stricken, on the fourth prison prior, it incorrectly shows defendant has a fourth prison prior.

In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS
J.

We concur:

McKINSTER
Acting P. J.

SLOUGH
J.